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RIGHTS AND DIGNITY: CONGRESS, THE SUPREME COURT, AND PEOPLE WITH DISABILITIES AFTER *PENNHURST*

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All great establishments in the nature of boarding schools, where the sexes must be separated; where there must be boarding in common, and sleeping in congregate dormitories; where there must be routine, and formality, and restraint, and repression of individuality; where the charms and refining influences of the true family relation cannot be had,—all such institutions are unnatural, undesirable, and very liable to abuse. We should have as few of them as possible, and those few should be kept as small as possible.

.

Let me dwell upon this, for in my view, it is very important. Such persons spring up sporadically in the community, and they should be kept diffused among sound and normal persons. Separation, and not congregation, should be the law of their treatment; for out of their infirmity or abnormality there necessarily grow some abnormal and undesirable effects, and unless these be counteracted by education, they disturb the harmonious development of character. These effects are best counteracted by bringing up the child among ordinary children, and subjecting him to ordinary social and family influences; but, on the contrary, they are intensified by constant and close association with children who are marked by the same infirmity or peculiarity. . . .

.

. . . Those establishments are all faulty. Not one of them is worthy to be your model in all respects; and the persons who flatter themselves that their favorite one is worthy to be copied exactly, are blind to faults which can be seen by looking beneath the surface. Never mind their showy buildings and special accommodations; you

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may as well measure the mortality of a family by the structure and arrangement of its dwellinghouse, as test institutions by their mechanical advantages; but look at the principles and system by which they are conducted. You will, then, find they are faulty in many respects.

.....
Instead, then, of copying the existing institution, I think, that in organizing a new one something like the following rough plan should be adopted:—If the field were all clear, and no buildings provided, there should be built only a building for school-rooms, recitation rooms, music rooms and work shops; and these should be in or near the centre of a dense population. For other purposes, ordinary houses would suffice.¹

I. INTRODUCTION

With courage and insight, Dr. Samuel Gridley Howe, founder in 1848 of the first public facility in the United States for persons with retardation, issued this warning and exhortation to an audience gathered for ceremonies on the laying of a cornerstone at the new state institution for the blind in Batavia, New York in 1886. The concept of the institution, in principle, was faulty. As Dr. Howe realized, respect for the dignity and special needs of people with disabilities requires life in a disability-integrated society.

Nearly 100 years later, this anti-institutional perspective is acquiring a legal foundation that complements the medical, psychological, and sociological research findings that institutions harm and debilitate the people they are intended to serve.² It is through the

1. Wolfensberger, *The Origin and Nature of Our Institutional Models*, in PRESIDENT'S COMM. ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 59, 138-141 (R. Kugel & W. Wolfensberger, eds. 1969) (quoting S.G. HOWE, IN CEREMONIES ON LAYING THE CORNERSTONE OF THE NEW YORK STATE INSTITUTION FOR THE BLIND, AT BATAVIA, GENESEE CO., N.Y. 39-43 (1866) (emphasis in original)).

2. See I. BELKNAP, HUMAN PROBLEMS OF STATE MENTAL HOSPITALS (1956); D. BRAGINSKY & B. BRAGINSKY, HANSELS AND GRETELS (1971); R.B. EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED (1967); E. GOFFMAN, ASYLUMS (1962); R. KING, N. RAYNES & J. TIZARD, PATTERNS OF RESIDENTIAL CARE: SOCIOLOGICAL STUDIES IN INSTITUTIONS FOR HANDICAPPED CHILDREN (1971); P. MORRIS, PUT AWAY (1969); D. VAIL, DEHUMANIZATION AND THE INSTITUTIONAL CAREER (1966); Tizard, *The Role of Social Institutions in the Causation, Prevention, and Alleviation of Mental Retardation*, SOCIAL-CULTURAL ASPECTS OF MENTAL RETARDATION 281 (H.C. HAYWOOD ED. 1970); FERLEGER & BOYD, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 STAN. L. REV. 717 (1979); McCormick, Balla & Zigler, *Resident-Care Practices in Institutions for Retarded Persons*, 80 AM. J. MENTAL DEFIC. 1 (1975); Wing, *Institutionalism in Mental Hospitals*, 1 BRIT. J. SOC. & CLINICAL

recognition of enforceable rights of the disabled that the law has begun to reach into the institutions and to redress the victims' grievances.³

This history in the United States is consistent with international elaboration of "bills of rights" for persons with disabilities. One of the first major accomplishments of the United Nations—created on the heels of the destruction and death of the Holocaust, World War II, Hiroshima and Nagasaki—was the Universal Declaration of Human Rights in 1948.⁴ At the same time, "in countries around the globe, parents of handicapped children began to rise up and demand from society a better life and greater acceptance for their children."⁵ These two international developments were linked: "The key issue of the emerging rehabilitation and habilitation movement was a belief

PSYCH. 38 (1962). One literature review concluded that "most institutional environments which have been studied do have adverse effects on the development of subnormal children." D. PILLING, *THE HANDICAPPED CHILD: RESEARCH REVIEW* 80 (1973). For a review and discussion of the professional literature see Ferleger, *Anti-Institutionalism and the Supreme Court*, 14 RUTGERS L. REV. (1983) (in press). For recent debate on the issues, see Ellis, *Common Sense in the Habilitation of Mentally Retarded Persons: A Reply to Menolascino and McGee*, 5 MENTAL RETARDATION 221 (1981); Ellis, *The Partlow Case: A Reply to Dr. Roos*, 5 LAW & PSYCH. REV. 15 (1979); Menolascino & McGee, *Rejoinder to the Partlow Committee*, 5 MENTAL RETARDATION 227 (1981); Menolascino & McGee, *The New Institutions: Last Ditch Arguments*, 5 MENTAL RETARDATION 215 (1981); Roos, *Custodial Care for the "Subtrainable"—Revisiting an Old Myth*, 5 LAW & PSYCH. REV. 15 (1979). See also J.A. TALBOTT, *THE DEATH OF THE ASYLUM* (1978).

3. See, e.g., *Symposium—Mentally Retarded People and the Law*, 31 STAN. L. REV. 541 (1979); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). The Supreme Court has held that people in mental institutions have a constitutional right to safe conditions, freedom of movement and related minimal training. *Youngberg v. Romeo*, 102 S. Ct. 2452, 2458-60 (1982); see also *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Brewster v. Dukakis*, No. 76-4423-F, slip op. at 8-12 (D. Mass. Dec. 7, 1978) (consent decree); *Welsch v. Likins*, 373 F. Supp. 487, 491-500 (D. Minn. 1974), *aff'd*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part*, 550 F.2d 1122 (8th Cir. 1977), *consent decree signed sub nom.*, *Welsch v. Noot*, No. 4-72 (D. Minn., Sept. 15, 1980); *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973), *enforced sub nom.*, *New York State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975), *enforced* 409 F. Supp. 606 (E.D.N.Y. 1976) (the Willowbrook case); *Wyatt v. Stickney*, 334 F. Supp. 1341, 1344 (M.D. Ala. 1971), *orders entered*, 344 F. Supp. 373 (M.D. Ala.) (order for mental illness facilities), 344 F. Supp. 387 (M.D. Ala.) (order for mental retardation facilities), *aff'd in part, rev'd and remanded in part sub nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See generally *ESTABLISHING AND MAINTAINING AN INSTITUTIONAL ADVOCACY PROGRAM: REPRESENTING PEOPLE WITH HANDICAPS* (S. Schwartz, R. Fleischner & D. Ferleger eds. 1981) (materials prepared for Legal Services Corp., Washington, D.C.).

4. G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), *reprinted in* 2 UNITED NATIONS RESOLUTIONS 135 (D. Djonovich ed. 1973).

5. Dybwad, *Societal Perspectives: Where Do We Go From Here?* in *COPING WITH CRISIS AND HANDICAP* 309 (A. Milunsky ed. 1981).

in the value and dignity of all human beings, their right to life, to liberty and security of person.”⁶

The United Nations issued its Declaration on the Rights of the Child in 1959,⁷ prescribing that the child who is physically, mentally, or socially handicapped must be given the special treatment, education, and care required by the individual.⁸ In 1971, the United Nations adopted the Declaration on the Rights of Mentally Retarded Persons.⁹ The 1971 Declaration provided that persons with retardation must enjoy, “to the maximum degree of feasibility, the same rights as other human beings.”¹⁰ Endorsing deinstitutionalization, the General Assembly supported integration of persons with retardation:

Whenever possible, the mentally retarded person should live with his own family or foster parents [and] participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.¹¹

In 1975, the broader Declaration on the Rights of Disabled Persons was adopted by the United Nations.¹²

“Bill of Rights” is a phrase that has ringing import in our history. As early as 1689, the phrase was familiar to those who settled in America.¹³ By 1784, seven states had adopted discrete declarations or bills of rights for incorporation into their constitutions.¹⁴ The new states were resolved that a Bill of Rights be added to the Federal Constitution. As the price for their ratification of the Constitution, the First Congress approved the Bill of Rights on September 26, 1789.¹⁵ It is the “numinous aura of the Bill of Rights”¹⁶ that

6. *Id.*

7. G.A. Res. 1386, U.N. GAOR, Supp. (No. 16) at 19, U.N. Doc. A/4249 (1959), reprinted in 7 UNITED NATIONS RESOLUTIONS 195 (D. Djonovich ed. 1974).

8. *Id.*

9. G.A. Res. 2856, 26 U.N. GAOR, Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971), reprinted in 13 UNITED NATIONS RESOLUTIONS 449 (D. Djonovich ed. 1976) [hereinafter cited as 1971 U.N. Declaration].

10. *Id.* ¶ 1.

11. *Id.* ¶ 4.

12. G.A. Res. 3447, 30 U.N. GAOR, Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975).

13. See The Bill of Rights, 1 W. & M. 2 ch. 2 (1688).

14. 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 101 (1971).

15. *Id.* at 455; see generally *id.* at 413-56 (historical discussion of the enactment of the United States Bill of Rights).

16. *Id.* at 457.

is evoked by the title and provisions of the Developmentally Disabled Assistance and Bill of Rights Act,¹⁷ the Supreme Court's treatment of which is the subject of this article.

In *Pennhurst State School and Hospital v. Halderman*,¹⁸ the Supreme Court of the United States undermined clear congressional intent and the statute's plain language. The Court reduced a powerful piece of legislation to a mound of politically self-serving rhetoric. The Court has upset the carefully preserved balance among coequal branches of our government and, with regard to the rights of persons with disabilities, has emerged as the supreme lawmaker of the land.

A legislative body speaks in many voices but acts in one: the legislation that it adopts. The myriad eddies of debate, compromise, committee hearings and findings produce a statute composed of words. The words alone do not compel a particular interpretation. The Supreme Court has stated: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." ¹⁹

In our discussion below, we present "the whole law, and its object and policy" and do so in a chronological and thematic organization. We have refrained, until the concluding portions of the article, from direct critical analysis of the Supreme Court's judgment, preferring to allow the reader to make the comparison and draw his or her own conclusions.

II. THE KENNEDY MESSAGE

*We as a Nation have long neglected the mentally ill and the mentally retarded. This neglect must end, if our Nation is to live up to its own standards of compassion and dignity and achieve the maximum use of its manpower.*²⁰

The promise made to the disabled population of America in the Developmentally Disabled Assistance and Bill of Rights Act had its origins in the combative "attack" on mental disabilities launched in the early sixties by the administration of President John F. Ken-

17. 42 U.S.C.A. §§ 6000-6081 (West 1977 & Supp. 1978-81).

18. 451 U.S. 1 (1981).

19. *Id.* at 18-19 (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (quoting *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)).

20. President's Special Message to Congress on Mental Illness and Mental Retardation, 1963 U.S. CODE CONG. & AD. NEWS, 1466, 1476 (Feb. 5, 1963) [hereinafter cited as President's Special Message].

nedy.²¹ On February 5, 1963, President Kennedy submitted to Congress a special message on the twin problems of mental illness and mental retardation in America. Reminding the legislators of the government's responsibilities "to assist, stimulate, and channel public energies" to resolve such problems, Kennedy accused America of a "tradition of neglect" in the area:

This situation has been tolerated far too long. It has troubled our national conscience—but only as a problem unpleasant to mention, easy to postpone, and despairing of solution. The Federal Government, despite the nationwide impact of the problem, has largely left the solutions up to the States. The States have depended on custodial hospitals and homes. Many such hospitals and homes have been shamefully understaffed, overcrowded, unpleasant institutions from which death too often provided the only firm hope of release.²²

A "bold new approach" was announced.²³ Kennedy exhorted all levels of government, private foundations, and individual citizens to face up to their responsibilities in the area of providing services to persons with disabilities by focusing on three national objectives: (1) Eradication of the causes of mental illness and retardation by increasing research efforts in the fields of science and medicine; (2) strengthening manpower resources by training more skilled workers and professionals for jobs in mental health; and (3) constructing additional and improved community based programs and

21. The authors wish to note what we deem an inherent weakness in President Kennedy's "combative" approach to providing health services for the mentally disabled. Although no stranger to the world of disabilities, (his own sister was retarded, had undergone a form of neurosurgery and was institutionalized in a private facility, R. KENNEDY, *TIMES TO REMEMBER* 151-52, 285-86 (1974)), John Kennedy's understanding of people with disabilities was flawed. He shared the same mistaken beliefs that were rampant among the public and mental health professionals alike: that the occurrence of retardation and diverse mental illnesses among a certain percentage of our population is not "normal"; that disabilities are freak accidents that can and should be effectively controlled and eventually eliminated by advances in medicine and technology; and that social and economic forces are not prime causes of disability. Until the so-called "able" forces of mankind learn to accept the principle that retardation and other impairments are perfectly "normal" and predictable phenomena within contemplation of the law of probabilities and our socio-economic system, our attempts to assist the "disabled" in effectively coping with our environment shall continue to fail. We must stop attempting to fit "disabled" individuals into "normal" molds and accept them for the worthy human beings that they are. "Differently-abled" is a more positive term than "disabled" and we commend its use.

22. President's Special Message, *supra* note 20, at 1467.

23. *Id.*

facilities to serve the disabled population.²⁴

President Kennedy intended his program to supplant existing "reliance on the cold mercy of custodial isolation"²⁵ with the "open warmth of community concern and capability."²⁶ He specifically attacked the "shabby treatment"²⁷ afforded millions of disabled Americans and the neglect of millions more in communities throughout the nation. The President aimed to reduce, within a decade, the total number of people under custodial care by fifty percent or more.²⁸ This national attack on mental disorders served more than the humanitarian purpose of releasing millions of suffering Americans from the bonds of social welfare.²⁹ The attack served practical purposes as well: conservation of public funds and conservation of manpower resources.³⁰

24. *Id.* at 1467-68.

25. *Id.* at 1468.

26. *Id.*

27. *Id.*

28. *Id.* at 1469.

29. President Kennedy's expressed objectives were:

[1] to bestow the full benefits of our society on those who suffer from mental disabilities;

[2] to prevent the occurrence of mental illness and mental retardation wherever and whenever possible;

[3] to provide for early diagnosis and continuous and comprehensive care, in the community, of those suffering from these disorders;

[4] to stimulate improvements in the level of care given the mentally disabled in our State and private institutions, and to reorient those programs to a community-centered approach;

[5] to reduce, over a number of years, and by hundreds of thousands, the persons confined to these institutions;

[6] to retain in and return to the community the mentally ill and mentally retarded, and there to restore and revitalize their lives through better health programs and strengthened educational and rehabilitation services; and

[7] to reinforce the will and capacity of our communities to meet these problems, in order that communities, in turn, can reinforce the will and capacity of individuals and individual families.

Id. at 1476-77.

30. President Kennedy calculated the average amount expended per day on the nation's eight hundred thousand institutionalized persons at \$4 per patient; "too little to do much good for the individual but too much if measured in terms of efficient use of our mental health dollars." *Id.* at 1467. President Kennedy estimated the total cost to taxpayers as over \$2.4 billion per year in direct public outlays for services. *Id.* Further, he claimed that indirect public outlays, such as welfare costs and the waste of human resources, were much higher. *Id.*

III: LEGISLATIVE ROOTS: THE MENTAL RETARDATION FACILITIES AND COMMUNITY MENTAL HEALTH CENTERS CONSTRUCTION ACT OF 1963

President Kennedy's call for decent services to benefit persons with disabilities was answered. Congress immediately responded to his recommendations in its passage of the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (CMHCA).³¹ Couched in terms similar to the President's Special Message, the purpose of CMHCA was "to provide assistance in combating mental retardation through grants for construction of research centers and grants for facilities for the mentally retarded and assistance in improving mental health through grants for construction and initial staffing of community mental health centers and for other purposes. . . ."³² Similar to the President's national plan, its scope was three-tiered. The bill provided for federal assistance in the following fields: Title I—construction of research centers and facilities for the mentally retarded; title II—establishment of comprehensive community mental health centers (that would provide a full range of services including at least diagnostic services, in-patient and out-patient care and day and night care); and title III—training and teaching of children with retardation, mental illness and other handicaps.³³ It is title II of CMHCA that eventually spawned the Developmentally Disabled Assistance and Bill of Rights Act.³⁴ Therefore, a closer examination of that title's legislative history is warranted.

Careful scrutiny of House Report No. 694 reveals just how closely the 88th Congress intended to embrace President Kennedy's proposed attack on mental disabilities. Both the President's address and the conference report on CMHCA relied heavily on data developed through the work of the Joint Commission on Mental Illness and Health.³⁵ Persuaded by the inequities and social injustices de-

31. Pub. L. No. 88-164, 77 Stat. 282 (codified as amended at 42 U.S.C.A. §§ 6000-6081 (West 1977 & Supp. 1978-81)).

32. H.R. REP. NO. 694, 88th Cong., 1st Sess. 1, *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 1054, 1054 [hereinafter cited as H.R. REP. NO. 694].

33. *See supra* note 31.

34. *See supra* note 17.

35. Pursuant to the Mental Health Study Act of 1955, ch. 417, 69 Stat. 381, Congress authorized this commission, comprised of thirty-six national organizations of principal scientific and professional associations concerned with health, education and welfare, to perform a long range study of the nation's health problems. The six year undertaking provided concepts and plans for effecting badly needed reforms in the treatment of mental illness. H.R. REP. NO. 694, *supra* note 32, at 10-11, *reprinted in* 1963 U.S.

scribed in that Commission's report, Congress concluded:

The evidence seems clear. Either we must develop the quantity and quality of community services which will ultimately replace these institutions or we will have to undertake a massive program to strengthen the State mental hospitals. The committee [on Interstate and Foreign Commerce, to whom S. 1576 was referred] believes that the development of new methods of treatment, the impressive evidence of the possibilities for rehabilitating the mentally ill, and a lessening of our disposition to reject and isolate the sufferers, all argue strongly for the treatment of mental illness in the community.³⁶

Thus, Congress uttered its first express resolve to mold the current trend toward deinstitutionalization into an official national policy aimed at the ultimate replacement of these institutions.

Congress did not take this initial step lightly, nor without hesitation. Rather, it realized its chosen course would require a major effort on the government's part because:

[A]t the present time only [one dollar] is being spent on community mental health services for every [ten dollars] being spent for care in State institutions. Waiting lists at community clinics are long and many communities have no programs at all. It is a rare community in the Nation where a citizen can, through a single point of contact, have access to the full range of diagnostic, therapeutic and rehabilitative services, both inpatient and outpatient, for mental illness.³⁷

Despite its awareness of the obvious expense involved, the 88th Congress willingly, responsibly, and intentionally plotted the nation's course toward deinstitutionalization.³⁸

CODE CONG. & AD. NEWS 1063. President Kennedy also appointed a Task Force, consisting of twenty-seven consultants in the field, with the mandate of preparing a national plan to combat mental retardation. After a year of intensive study, the panel submitted its report which provided additional statistical information relied on in his message to Congress. *Id.* at 10-13, *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 1063-65.

36. *Id.* at 12, *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 1065.

37. *Id.*

38. It is important to note at this juncture that even in the seminal stages of developing comprehensive health services for the mentally disabled, Congress was careful to avoid running head-on into problematic separation of powers conflicts:

It is the strong belief of the committee that Federal support is necessary to assist in the creation of community mental health services, but such Federal support should be so tailored as not to result in the Federal Government assuming the traditional responsibility of the States, localities and the medical profession for the care and treatment of the mentally ill. The committee believes that title II [of CMHCA] accomplishes this objective.

IV. THE PROMISE IMPROVED: THE TRANSITIONAL PHASE

The national trend towards deinstitutionalization spirited by President Kennedy's attack on mental disabilities met with great success in its early years. In 1965, the 89th Congress voted to extend title II of the 1963 legislation,³⁹ in order to alleviate "the immediate financial problems which are acute and critical to the success of improving the treatment of the mentally ill through establishing community mental health centers."⁴⁰ Stating that its intention was not that the federal government assume the traditional responsibilities of the states in this field, the committee designated the government's proper role in this *transitional period* as one of granting financial assistance. Thus, allocations for federally funded programs were made on a declining basis.⁴¹

Minor amendments extending CMHCA were enacted during sessions of the 89th and 90th Congresses,⁴² and in 1970, a new

H.R. REP. NO. 694, *supra* note 32, at 13, *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 1066.

39. *See* Mental Retardation Facilities and Community Mental Health Centers Construction Act Amendments of 1965, Pub. L. No. 89-105, 79 Stat. 427.

40. S. REP. NO. 366, 89th Cong., 1st Sess. 3, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 2401, 2403.

41. When passed, the scale provided seventy-five percent of the cost of professional and technical personnel for fifteen months; sixty percent for the next twelve months; forty-five percent for the next twelve months; and thirty percent for the final twelve months. *Id.*

42. *See* Mental Health Amendments of 1967, Pub. L. No. 90-31, 81 Stat. 79; Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282. In considering the former enactment, the Senate noted that despite progress made in the area, "we are a long way from the goals that were identified when the legislation for community mental health centers was proposed in 1963. Our goal was to reduce the resident population in public mental hospitals to 250,000 by 1973. Our present census is 480,000." S. REP. NO. 294, 90th Cong., 1st Sess. 3, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 1252, 1254. Furthermore, Congress recognized its failure to attain its goals for complete coverage: only two hundred eighty-six out of the intended two thousand community centers received funding in the 1967 fiscal year. Congress' intent to give a new impetus to deinstitutionalization was evidenced in its delineation of "comprehensive coverage." Comprehensive coverage includes such "essential elements" as inpatient and outpatient services, emergency and partial hospitalization services, and education and consulting services. "Additional elements" include diagnostic, rehabilitative, pre care and after care services, training programs, and research and evaluation programs. *Id.* at 3-6, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 1254-56. To attain these ends, Congress authorized for appropriation, \$238 million over a three year period. Mental Health Amendments of 1967, Pub. L. No. 90-31, §§ 2-3, 81 Stat. 79; S. REP. NO. 294, 90th Cong., 1st Sess. 7, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 1258 (chart).

The 90th Congress also passed the Mental Retardation Amendments of 1967, Pub. L. No. 90-170, 81 Stat. 527, similarly authorizing the establishment of more community facilities specifically for persons with retardation. A total of \$80 million was appropriated for this end. S. REP. NO. 725, 90th Cong., 1st Sess. 7, *reprinted in* 1967 U.S. CODE

framework for mental health services was imposed on the existing scheme by the 91st Congress. The Developmental Disabilities Service and Facilities Construction Amendments of 1970⁴³ were a three-year extension of the existing grant program to promote the construction and staffing of facilities for persons with retardation. The amendments expanded the scope of the program's coverage to include individuals suffering from other neurological handicapping conditions requiring similar care.⁴⁴ A new label, "developmental disabilities,"⁴⁵ was adopted explicitly to provide needed services to a population discovered to have "fallen between the cracks" of avail-

CONG. & AD. NEWS 2061, 2067 (chart). Additionally, these amendments established a grant program to train professionals to staff community residential programs, furthering the congressional goal of deinstitutionalization. Senators Javits and Prouty stated:

This provision is, in effect, an investment in rehabilitation. Mentally retarded children can be educated to be useful citizens, in many cases self-supporting, and in most instances to be free of the need for expensive institutional care. . . .

[Our aid towards this rehabilitation can mean] the difference between being a whole human being and being an impersonal statistic in an institution.

Id. at 17, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2071.

43. Pub. L. No. 91-517, 84 Stat. 1316.

44. In addition to specifying cerebral palsy and epilepsy as "developmental disabilities," see *infra* note 45, Congress delegated to the Secretary of the Department of Health, Education and Welfare the duty of evaluating and determining which additional disabilities qualify for assistance of federally funded programs. Pub. L. No. 91-517, § 139, 84 Stat. 1324.

45. The definition of "developmental disabilities" is subject to fluctuation upon approval of the Secretary of the Department of Health and Human Services (HHS) (formerly the Department of Health, Education and Welfare). As currently defined, the term includes any disability of a person which:

- (i) [i]s attributable to mental retardation, cerebral palsy, epilepsy, or autism;
- (ii) is attributable to any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons; or (iii) is attributable to dyslexia resulting from a disability described in paragraph (a)(i) or (ii) . . . ; (iv) originates before such person attains age eighteen; (v) has continued or can be expected to continue indefinitely; and (vi) constitutes a substantial handicap to such person's ability to function normally in society.

45 C.F.R. § 1385.2(a)(6) (1982). This may be compared to the 1978 amended statutory definition which includes:

- any severe, chronic disability of a person which— (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (B) is manifested before the person attains age twenty-two;
- (C) is likely to continue indefinitely;
- (D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction,

able federally funded programs.⁴⁶

V. THE BILL OF RIGHTS ACT: LEGISLATIVE INTENT AND PLAIN LANGUAGE

Against this legislative backdrop emerged the Developmentally Disabled Assistance and Bill of Rights Act (Bill of Rights Act).⁴⁷ As its name indicates, the Bill of Rights Act was intended to provide a new dimension to national efforts aiding persons with disabilities.⁴⁸ The following discussion explores the parameters of that dimension.

A. *The Statute's Plain Language*

In its present form, the Bill of Rights Act is divided into three main sections. Title I calls for the "Extension and Revision of the Developmental Disabilities Services and Facilities Construction Act" and basically outlines a federal-state cooperative funding scheme to serve persons with developmental disabilities. Part A of title I extends existing grant authorities, while part B revised federal assistance for university-affiliated facilities. Notable for our purposes are sections 105⁴⁹ and 110(b),⁵⁰ which state clear congressional

(vi) capacity for independent living, and (vii) economic self-sufficiency; and

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 503(b)(1), 92 Stat. 3004-05 (codified at 42 U.S.C. § 6001(7)(A)-(E) (Supp. IV 1980)).

46. See H.R. REP. NO. 1277, 91st Cong., 2nd Sess. 13, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4714, 4718.

47. Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified as amended at 42 U.S.C.A. §§ 6000-6081 (West 1977 & Supp. 1978-81)).

48. Although the Supreme Court found that the Bill of Rights Act represented "a mere federal-state funding statute," *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. at 18, intended to "encourage, rather than mandate, the provision of better services to the developmentally disabled," *id.* at 20 we believe that our careful inspection of its legislative history shows that it is more than a mere funding statute. The legislative process, including three years of hearings, extensive debate, and study of institutions and their alternatives, demonstrates the studied intention with which Congress abandoned a purely encouragement-funding strategy and adopted an enforcement-rights solution.

49. Pub. L. No. 94-103, sec. 105, §§ 121-127, 89 Stat. 486-88 (1975) (codified as amended at scattered sections of 42 U.S.C.). Section 105 provided in part that "[t]he Secretary shall give special consideration to applications for grants . . . for programs which demonstrate an ability and commitment to provide within a community rather than in an institution services for persons with developmental disabilities." *Id.*, sec. 105, § 122(b), 89 Stat. 487 (1975) (current version at 42 U.S.C. § 6032 (Supp. IV 1980)).

50. *Id.*, sec. 110(b), § 132(a)(4), 89 Stat. 490 (1975), repealed by Rehabilitation,

intent to assist states in the deinstitutionalization process. Likewise, section 111(a)⁵¹ merits our attention; it requires that state plans be submitted for approval to the Secretary of the Department of Health and Human Services (HHS). These plans are required to assure "that the human rights of all persons with developmental disabilities (especially those without familial protection) who are receiving treatment, services or habilitation under programs assisted under this chapter will be protected. . . ." ⁵² Further, evidence that Congress intended these rights to be realized is contained in the same provision requiring the State Planning Council to "provide for a design for implementation which shall include details on the methodology of implementation of the State Plan." ⁵³

Title II provides for the "Establishment and Protection of the Rights of Persons with Developmental Disabilities" ⁵⁴ and contains the so-called "Bill of Rights," which serves as the focal point of the discussion below. Title III, entitled "Miscellaneous," ⁵⁵ provides that the Secretary is to determine which disabilities shall be covered by the Act within six months of its enactment.

Significant amendments to the Act were made in 1978 and are discussed where relevant below. ⁵⁶ The only other noteworthy legislative change in the statute occurred at the onset of the Reagan Administration's budget cutting efforts: appropriations for the Act were slashed by more than one-half in the Omnibus Reconciliation Act of 1981. ⁵⁷

Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 510(b)(1), 92 Stat. 3010. Section 110(b) provided in part that:

Of the amount allotted to any State under paragraph (1) for fiscal year 1976, not less than 10 per centum of that allotment shall be used by such State, in accordance with the plan submitted, . . . for the purpose of assisting it in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities; and of the amount allotted to any State under paragraph (1) for each succeeding fiscal year, not less than 30 per centum of that allotment shall be used by such State for such purpose.

Id.

51. *Id.*, sec. 111(a), § 134, 89 Stat. 490 (1975) (codified as amended at scattered sections of 42 U.S.C.).

52. *Id.*, sec. 111(a)(9), § 134(b), 89 Stat. 491 (codified as amended at 42 U.S.C. § 6063(b)(5)(C) (Supp. IV 1980)).

53. *Id.* (current version at 42 U.S.C. § 6063 (1976 & Supp. IV 1980)).

54. *Id.*, secs. 201-204, §§ 111-113, 89 Stat. 502-05 (1975) (codified as amended at 42 U.S.C.A. §§ 6010-6012 (West 1977 & Supp. 1978-81)).

55. *Id.*, secs. 301-303, 89 Stat. 505-07 (1975).

56. *See* Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955.

57. Pub. L. No. 97-35, §§ 911, 913, 95 Stat. 357, 563-64. It is particularly important

B. *Legislative Intent: Explicit and Obviously Implied*

*I conceive a Bill of Rights should be a plain positive declaration of the rights themselves. . . it should retain such natural rights as are either consistent with, or absolutely necessary toward our happiness in a state of civil government.*⁵⁸

The practice of enumerating cognizable and enforceable rights in charter form is a well established tradition in American history. By 1784, seven of the thirteen original states had adopted declarations of discrete rights and four others had incorporated specified individual rights into their constitutions.⁵⁹ For some colonial legislators, ratification of the federal constitution was conditioned upon the new states' agreement to adopt a federal Bill of Rights. This was successfully accomplished during the first session of Congress on September 26, 1789.⁶⁰

In light of America's early heritage and struggle for independence, it is highly improbable that the 94th Congress passed into law a "Bill of Rights for the Developmentally Disabled" without full appreciation of the import of its chosen words. Senator Jacob Javits of New York originally introduced S. 458⁶¹ as a Bill of Rights for persons with retardation in response to the horrors uncovered at Willowbrook,⁶² an institution located in his home state. Unable to muster enough support through his own efforts, Javits agreed to incorporate S. 458 into S. 3378,⁶³ a measure proposed "to provide assistance for the Developmentally Disabled, establish a bill of rights for the Developmentally Disabled, and for other purposes."⁶⁴ En-

in a period of economic recession that the rights recognized by Congress in the Bill of Rights Act receive full judicial support. By taking the bite out of this federal statute (by relegating state compliance therewith from mandatory to volitional, 451 U.S. at 22), the Supreme Court in *Pennhurst* abandoned the disabled to cost-conscious state legislatures which are rarely influenced by politically powerless disabled persons.

58. Paine, *Thomas Paine on a Bill of Rights*, in 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 315 (B. Schwartz ed. 1971).

59. J. GOEBEL, *supra* note 14, at 101 n.15.

60. *See supra* note 15.

61. 93d Cong., 1st Sess. (1973).

62. *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 755-57 (E.D.N.Y. 1973), *enforced sub nom.*, *New York State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975), *enforced* 409 F. Supp. 606 (E.D.N.Y. 1976); G. RIVERA, *WILLOWBROOK: A REPORT ON HOW IT IS AND WHY IT DOESN'T HAVE TO BE THAT WAY* (1972).

63. 93d Cong., 2d Sess., 120 CONG. REC. 33,097 (1974).

64. *Id.* at 33,151. As incorporated into title II of S. 3378, the purpose of the "Bill of Rights for the Mentally Retarded and Other Individuals with Developmental Disabilities" was "to establish standards which assure human care, treatment, habilitation, and

acted to correct inequities discovered by the General Accounting Office's study of mental health services, this Bill passed the Senate without a dissenting vote on October 1, 1974;⁶⁵ the 93rd Congress, however, adjourned shortly thereafter, before S. 3378 could go into conference.

Supporters of S. 3378 were determined to fulfill the nation's commitment to its mentally disabled population and introduced S. 3378 as a clean bill, S. 462,⁶⁶ at the very next session. Bearing the same title as its predecessor, S. 462 was similarly introduced by Senator Jennings Randolph with an intent to "amend the Developmental Disabilities Services and Facilities Construction Act to revise and extend the program authorized by that Act."⁶⁷ Several "technical or minor" differences were noted between the two bills;⁶⁸ however, their basic thrust was identical: to provide high quality services to and promote maximum development of the developmentally disabled.

Title II of S. 462, containing the "Bill of Rights for Mentally Retarded and Other Persons with Developmental Disabilities," was considered the "most important aspect of the bill."⁶⁹ This section of title II sought to establish residential and community facilities for the developmentally disabled, and to develop alternative procedural and performance criteria for use by facilities to comply with its stan-

protection of the mentally retarded and other individuals with development disabilities in residential facilities and minimize inappropriate admissions to such residential facilities." *Developmentally Disabled Assistance and Bill of Rights Act, 1974: Hearing Before Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare on S. 3378*, 93d Cong., 2d Sess. 44 (1974).

Minutely detailed regulations for accomplishing this goal were set out. In voicing his approval of the scheme, Mr. Stephen Kurzman, Assistant Secretary for Legislature, Department of Health, Education and Welfare stated that, "[i]t is the policy of HEW to encourage deinstitutionalization where such a program is consistent with the capacities of the individuals concerned and where the home community can provide alternate services. *Id.* at 277.

65. 120 CONG. REC. 33,151 (1974).

66. 94th Cong., 1st Sess. 121 CONG. REC. 1,507 (1975).

67. *Id.* at 16,470.

68. Senator Randolph noted that S. 462 called for the clarification of committee's intent that only severe specific learning disabilities are to be included in the definition of developmentally disabled; deletion of the provision calling for an Office of Developmental Disabilities; deletion of requirement of federal approval of construction and renovation projects; addition of protections for employees "who either lose their jobs or are transferred because of the deinstitutionalization process. This in no way changes the committee's commitment to deinstitutionalization whenever appropriate for the individual"; revamping and clarification of the section on evaluation procedures; and technical changes and consolidation of duplicative language. *Id.* at 16,515.

69. *Id.* at 16,516 (1975) (statement of Sen. Stafford).

dards. The clear intent was "to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization or the need for the use of community facilities and programs."⁷⁰

Further evidence that title II of S. 462 was intended by its supporters to create enforceable rights for the developmentally disabled is found in Senator Williams' discussion of the bill on the floor. Recalling the atrocities of Willowbrook in New York, Partlow in Alabama, and Rosewood in Maryland,⁷¹ Senator Williams reminded his colleagues of the universality of institutional abuse and the need to bring it to an end: "While much can be said about the lack of available funds to improve conditions at these institutions, at some point this country must draw the line. The abuses are too commonplace to point at a single institution, or a single abuse and say it is an anomaly."⁷² By specifying explicit minimum standards for both community service agencies and residential facilities, S. 462 provided a framework by which the constitutional rights of residents and other persons with developmental disabilities could be measured and enforced.

The authority with the greatest insight as to the meaning of title II of S. 462 is the author of the original Bill of Rights for the Mentally Retarded, Senator Jacob Javits of New York. Debates on the issues presented in the Bill of Rights since the 92nd Congress convinced the New York Senator that a comprehensive planning approach to improve the situation of persons with developmental disabilities would get further mileage than legislation directed solely at mental institutions.⁷³ Relying on the mechanism provided in section 203 of the Bill of Rights Act, by which a state must assure HHS that its federally funded residential and community facilities comply with title II's alternative set of standards,⁷⁴ Senator Javits believed that the primary emphasis for federally funded programs would be to place those individuals in the least restrictive program and living environment commensurate with their capabilities.⁷⁵ Those state plans failing to measure up to title II's standards would simply re-

70. *Id.*

71. *Id.* (statement of Sen. Williams).

72. *Id.* at 16,516-17.

73. *Id.* at 16,518 (statement of Sen. Javits).

74. Pub. L. No. 94-103, § 203, 89 Stat. 504 (1975) (codified as amended at 42 U.S.C.A. § 6012 (West Supp. 1978-81)).

75. 121 CONG. REC. at 16,518 (statement of Sen. Javits).

main ineligible for federal funding.⁷⁶ Clearly, in passing S. 462, Congress embraced the principles of deinstitutionalization and normalization.⁷⁷

There can be no doubt that the text of the final version of the Bill of Rights Act, as ratified by both Houses of Congress and consistent with legislative intent, recognizes substantive rights of America's citizens with mental disabilities and creates procedural safeguards to guarantee these rights. In his discussion of the conference report, Senator Stafford stated: "Title II provides for procedural guarantees of the rights of the developmentally disabled in programs supported by the Federal Government. It also strengthens the administrative ability of the Department of HEW to protect the constitutionally guaranteed rights of institutionalized individuals."⁷⁸ Furthermore, the "rights" were retained in the conference committee's compromise "in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the condition for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts."⁷⁹ It is noteworthy that conferees of both Houses of Congress accepted the Bill of Rights Act despite express official disapproval by the Department of HEW. In a letter dated February 19, 1975, Secretary of HEW, Casper Weinberger, wrote: "We do not believe that the standards set forth in Title II are achievable at the present time, nor are they the best means of improving the quality of care provided to persons in these facilities."⁸⁰ As a substitute for S. 462, Secretary

76. The constitutionality of requiring state compliance with federal standards in return for highly competitive federal funds is well settled. *Oklahoma v. United States Civil Serv. Comm'n.*, 330 U.S. 127, 143 (1947); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585-93 (1936); *United States v. Butler*, 297 U.S. 1, 68-78 (1935). "It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure." *Id.* at 85 (Stone, J., dissenting).

77. "Normalization" is a concept that encompasses the techniques and goals of habilitation. It encompasses the creation of an environment designed to increase complexity of behavior and to foster qualities defined as normative by the world in which we live. See generally Wolfensberger, *The Definition of Normalization: Update, Problems, Disagreements, and Misunderstanding*, in *NORMALIZATION, SOCIAL INTEGRATION AND COMMUNITY SERVICES* 71-115, (R. Flynn & K. Nitsch eds. 1980) (background discussion of the concept of "normalization" and the controversies surrounding its definition).

78. 121 CONG. REC. 29,819 (1975) (statement of Sen. Stafford).

79. *Id.* (quoting H.R. CONF. REP. NO. 473, 94th Cong., 1st Sess. 42, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 943, 961).

80. H.R. REP. NO. 58, 94th Cong., 1st Sess. 23, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 919, 941 [hereinafter cited as H.R. REP. NO. 58].

Weinberger submitted a proposal that would omit any corresponding provision to title II and one that was approved by the Office of Management and Budget as in accordance with the program of President Nixon.⁸¹

Despite official administrative objection and over the money-minded protestations of Representatives Devine and Collins,⁸² Congress deliberately enacted the Bill of Rights as it emerged from conference.⁸³ For the first time under federal law, section 6010 establishes a right of the developmentally disabled to appropriate treatment, services, and habilitation designed to maximize developmental potential of the person and provided in a setting that is least restrictive of personal liberty.⁸⁴ Furthermore, the section explicitly imposes on the federal government and the states an obligation to assure that public funds be withheld from institutions or residential programs serving the disabled that do not provide adequate treatment, services or habilitation, or meet an alternate scheme comprised of six standards.⁸⁵ Additional safeguards provided by section 6011 are individual habilitation plans for each person served in programs funded under the Act as well as a requirement of continuous review and evaluation of programs by the Secretary of HHS.⁸⁶

In 1978, three significant amendments were made to the Bill of Rights Act. First, the definition of "developmental disabilities" was amended to delete specific categories of mental illness and to substitute a definition including mental or physical impairments resulting in particular disabilities.⁸⁷ Secondly, the National Advisory Board was abolished.⁸⁸ Finally, the language of section 6010 was amended to clarify that the rights of the developmentally disabled established in the Act are "in addition to any constitutional or other rights other-

81. *Id.* at 21-23, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 939-41.

82. *Id.* at 43, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 942-43.

83. 121 CONG. REC. 29,309 (1975) (House); *id.* at 29,317 (Senate). The Bill of Rights as enacted by Congress is codified at 42 U.S.C. § 6010 (1976 & Supp. IV 1980).

84. 42 U.S.C. § 6010(1)-(2) (1976); *see also* 121 CONG. REC. 29,821 (statement of Sen. Williams).

85. 42 U.S.C. § 6010(3) (1976); *see also* 121 CONG. REC. 29,820 (statement of Sen. Javits).

86. 42 U.S.C. § 6011 (1976 & Supp. IV 1980).

87. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 503(b)(1), 92 Stat. 3004-05 (codified at 42 U.S.C. § 6001(7)(A)-(E) (Supp. IV 1980)); *see supra* note 29.

88. 42 U.S.C. § 6007 (1976), *repealed by* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 504(a), 92 Stat. 3006.

wise afforded to all persons.”⁸⁹

VI. THE PROMISE OF *PENNHURST*

It was in the context of a Pennsylvania case, *Halderman v. Pennhurst State School & Hospital*,⁹⁰ that the Supreme Court of the United States undertook its review of the Bill of Rights Act. This section discusses the background of the case.

A. *Pennhurst on Trial*

Headline-hungry journalists did not burst open the doors of Pennhurst; nor was it purely parental concern prompting this complex, still lingering litigation. Rather, the case was initiated by the institution's administration, when Pennhurst's assistant superintendent prompted Winifred Halderman, on behalf of her daughter, Terri Lee Halderman, to call David Ferleger, an attorney specializing in disability law. Subsequently, suit was filed in an effort to end what had become a living hell for far too many Pennsylvanians.

Pennhurst State School and Hospital was established in 1908 as the Eastern Pennsylvania School for the Feeble-Minded and Epileptic.⁹¹ Its purpose was to care for and train residents with retardations and enable them to return to society as functioning human beings.⁹² As was common among other large institutions at the time, however, this objective received short shrift. Instead, Pennhurst continually visited inexorable physical and psychological damage on those it was established to assist. The institution increased the helplessness of its residents who, by virtue of their handicap, were least

89. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 507, 92 Stat. 3007 (codified at 42 U.S.C. § 6010 (Supp. IV 1980)). The text of section 6010 is reproduced in Appendix A.

90. 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd*, 612 F.2d 84 (3rd Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981), *on remand*, 673 F.2d 645 (3d Cir.), *cert. granted*, 102 S. Ct. 2956 (1982). Implementation matters at 545 F. Supp. 410 (E.D. Pa. 1982) (Special Master phased out); 542 F. Supp. 619 (E.D. Pa. 1982) (amendment issued *sua sponte*); 536 F. Supp. 522 (E.D. Pa. 1982) (motion to amend granted); 533 F. Supp. 668 (E.D. Pa. 1982) (motion for stay denied); *Id.* at 661 (stay denied and report adopted); *Id.* at 649 (attorney's fees awarded); *Id.* at 641 (motion to purge contempt granted); 526 F. Supp. 428 (E.D. Pa. 1981) (order for Special Master to continue to monitor compliance); *Id.* at 423 (order for fines to be used to pay Special Master costs); *Id.* at 414 (contempt fine denied, attorney's fees awarded); 533 F. Supp. 631 (E.D. Pa. 1981) (order *aff'd*); 526 F. Supp. 409 (E.D. Pa. 1981) (stay denied); 451 F. Supp. 233 (E.D. Pa. 1978) (stay denied).

91. 1907 Pa. Laws 44-45 (Act 42); *see also* *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. at 1302.

92. 1907 Pa. Laws 44-45 (Act 42).

able to resist and most likely to suffer from an inflexible system.⁹³

Through endless years of overcrowding, inadequate funding, understaffing, chronic resident abuse and neglect, Pennhurst became what United States District Judge Raymond J. Broderick described as "a monumental example of unconstitutionality with respect to the habilitation of the retarded."⁹⁴ Over thirty-two trial days, the court listened to testimony of eighty witnesses, including thirteen experts in the field of retardation, nine parents, three former residents, thirty-nine employees, and two Pennsylvania officials. All parties to the litigation agreed that Pennhurst, as an institution, constituted an inappropriate and inadequate method to achieve habilitation of the retarded.⁹⁵

The defendants in *Pennhurst* hired experts to assist them in preparing for trial. After a three months study, yielding a 350 page report with a thousand page appendix, even they concluded that the institution was beyond remedy:

We came to the conclusion that it could not, that there is no way that Pennhurst could be made into an adequate facility. It is simply too far beyond repair and there are just literally hundreds of reasons why this is the case, not the least of which is the fact that Pennhurst as the whole structure, the whole way of operating out there is simply too far gone.⁹⁶

Based upon such testimony and findings, the trial court ruled that Pennhurst violated plaintiffs' constitutional right to adequate habilitation, and federal and state statutory rights to minimally adequate and nondiscriminatory habilitation.⁹⁷ The court ordered that Pennhurst's doors be closed.⁹⁸

B. *The Promise on Appeal*

In *Halderman v. Pennhurst State School & Hospital*⁹⁹ the United States Court of Appeals for the Third Circuit substantially affirmed the trial court's decision, while modifying its order in significant

93. See 446 F. Supp. at 1302-11.

94. *Id.* at 1320.

95. *Id.* at 1304, 1313.

96. 1977 Trial Transcript, at 13-131, *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295 (1975) (on file with author).

97. 446 F. Supp. at 1314-24. Such findings were predicated on claims of violations of the United States Constitution, as well as on federal and state statutory grounds. *Id.*

98. *Id.* at 1326-29.

99. 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981), *on remand*, 673 F.2d 645 (3d Cir.), *cert. granted*, 102 S. Ct. 2956 (1982).

ways.¹⁰⁰ Although the district court predicated its findings of plaintiffs' right to habilitation on constitutional as well as federal and state statutory grounds, the court of appeals followed the preferred legal method of granting relief in the federal court system and turned first to the federal statutory issues. Changing only the statutory grounds upon which the trial court based plaintiffs' right to minimally adequate habilitation, section 504 of the Rehabilitation Act of 1978,¹⁰¹ the court held that the same right exists pursuant to section 6010.¹⁰² After an exhaustive review of the Bill of Rights Act's legislative history, the court concluded that the Act expressly provides the developmentally disabled with a right to habilitation; indeed, the court maintained that Congress could not have been any more precise in conferring such a right.¹⁰³

Next, the Third Circuit held that "retarded persons have a private right of action under the Act."¹⁰⁴ In agreement with the court in *Naughton v. Bevilacqua*,¹⁰⁵ the Third Circuit detected a "dichotomy"¹⁰⁶ in the Bill of Rights section which suggests that denial of funds is not the only enforcement mechanism for the statutory rights declared therein.¹⁰⁷ The rights included in the Conference Report were retained "in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts."¹⁰⁸

100. Although the Third Circuit ruled that people living at Pennhurst are entitled to minimally adequate care in the least restrictive environment, *Id.* at 107, it further ruled that Pennhurst need not be ordered closed. *Id.* at 113. The court found that each Pennhurst resident required an individualized determination of the least restrictive living alternative most suited to the needs of the individual, with a presumption in favor of community living arrangements. *Id.* at 114.

101. 29 U.S.C. § 794 (Supp. V 1981).

102. 42 U.S.C. § 6010 (1976 & Supp. IV 1980).

103. 612 F.2d at 96.

104. *Id.* at 97.

105. 458 F. Supp. 610 (D.R.I. 1978) (injunctive relief and damages granted to retarded child and to the child's father for injuries sustained by the child as a result of drugs administered in a Rhode Island institution).

106. 612 F.2d at 97. Section 6010 is divided into two parts: "the first 'declares the right to appropriate treatment;' the second 'provides that federal funds are available only to programs that meet certain basic minimum standards and offer "appropriate" treatment.'" *Id.* (quoting 458 F. Supp. at 616).

107. *Id.*

108. H.R. CONF. REP. NO. 473, 94th Cong., 1st Sess. 42, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 943, 961.

Furthermore, the court noted that pursuant to section 6012(a),¹⁰⁹ participating states are required "to establish an independent agency to protect and . . . to pursue legal, administrative and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services or habilitation within the State."¹¹⁰ The creation of an agency to "protect rights" presumes the existence of rights to protect.

Adhering to the standard for implying a private cause of action, as articulated in *Cort v. Ash*,¹¹¹ the Third Circuit found that: (1) Pennhurst residents as individuals with retardation were undoubtedly the beneficiaries of the Act; (2) legislative intent indicates congressional desire that the Act be enforceable in the courts; (3) a private right of action in this case would further the Act by enabling improvements in the delivery of services to persons with developmental disabilities without forcing the federal government to resort to the drastic remedy of a cut-off of funds; and (4) Congressional recognition of a right to habilitation in section 6010 does not displace traditional state concerns, such as providing for the health and well-being of the citizenry or various police powers.¹¹²

The final conclusion gleaned by the court of appeals from the legislative history of the Bill of Rights Act is that the rights contained in section 6010 were enacted by Congress pursuant to both its spending power¹¹³ and paragraph five of the fourteenth amend-

109. 42 U.S.C. § 6012(a) (Supp. IV 1980).

110. 612 F.2d at 97 (quoting 42 U.S.C. § 6012(a) (Supp. IV 1980)). The *Naughton* court observed that the "enforcement of individual rights, however, cannot be achieved solely by withholding federal funds; not only is the Secretary incapable of investigating every violation, but the Secretary may quite properly be unwilling to withhold funds for a single violation. Thus, the advocacy agency and a private right of action are crucial to protect the rights secured by the Act." 458 F. Supp. at 616.

111. 422 U.S. 66 (1975). The *Cort* Court listed four factors considered relevant in implying a private right of action: (1) whether plaintiffs are especial beneficiaries of the statute; (2) whether there exists positive indication of legislative intent to create a private remedy; (3) whether a private remedy would further the policies of the statute; and (4) whether the cause of action is one traditionally relegated to the state. 422 U.S. at 78. See also *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (implying a private right of action under title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976)).

112. 612 F.2d at 97-99. It is noteworthy, considering the *Cort* analysis, that no negative intent of Congress is indicated in the Bill of Rights Act's legislative history. The Supreme Court held in *Cort* that in situations where "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." 422 U.S. at 82 (emphasis in original).

113. 612 F.2d at 98-99. In reference to section 6063(b)(20)(B) (1976), which was repealed in 1978, the court noted that "Congress thus invoked its spending clause powers to condition the grant of federal monies on the provision by the states of adequate care."

ment.¹¹⁴ "In section 6010, Congress has legislated with respect to the State intrusion on personal security of the developmentally disabled."¹¹⁵ This right to be free from—and to obtain judicial relief for—unjustifiable intrusion of personal security was recognized by the Supreme Court in *Ingraham v. Wright*,¹¹⁶ and the fourteenth amendment makes infringement of such rights enforceable against the states.¹¹⁷ "Thus, in providing specific guarantees for a particular affected group, Congress' action is consistent with the Supreme Court's recognition of the broad underlying right protected against impairment by the states through the fourteenth amendment."¹¹⁸

C. *A Right is not a Right: The Supreme Court and Pennhurst*

Gertrude Stein would probably have framed the issue before the Supreme Court in *Pennhurst* by stating that "a right is a right is a right." Yet at least in the minds of four currently seated Supreme Court Justices,¹¹⁹ the "rights" expressly "established" for protection of the developmentally disabled in the Bill of Rights Act by representatives in both Houses of Congress are not "rights" deserving either judicial acknowledgement or enforcement.¹²⁰

612 F.2d at 99. Today, section 6063(b)(5)(C) (Supp. IV 1980) replaces the deleted section. Pennsylvania accepted funds under the Act and must be held to its obligations thereunder.

114. 612 F.2d at 98. The court noted that congressional intent to enforce recognized constitutional rights is "amply borne out by the legislative history of the Act." *Id.* at 98 n.17. Further, Senator Stafford stated that, "[t]itle II was added to the bill to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization or the need for the use of community facilities and programs." 121 CONG. REC. 16,516 (1975) (statement of Sen. Stafford). Finally, Senator Javits cited *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971), *orders entered*, 344 F. Supp. 373 (M.D. Ala.), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd and remanded in part sub nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), as requiring "constitutionally minimum standards for the care and treatment of mentally retarded patients." 121 CONG. REC. 16,519 (1975) (statement of Sen. Javits).

115. 612 F.2d at 98.

116. 430 U.S. 651, 673 (1977).

117. *Id.* at 673 n.42.

118. 612 F.2d at 98. A private cause of action is more readily implied where the fourteenth amendment is invoked, for under section five of the amendment, Congress may establish certain restrictions that might otherwise implicate the prerogatives of the states. *Id.* & 98 n.19.

119. Justice Rehnquist delivered the opinion of the Court in *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981), and was joined by Chief Justice Burger and Justices Stewart, Powell, and Stevens. Justice O'Connor had not yet joined the Court.

120. *Id.* at 15-27. Specifically, the *Pennhurst* majority held that section 6010 does not create, for persons with retardation, any substantive right to appropriate treatment in the least restrictive environment. *Id.* at 18. Instead, the Court interpreted the Develop-

The absurd result reached by the majority of the Court in *Pennhurst State School & Hospital v. Halderman*¹²¹ is objectionable for two reasons. First, from a social policy standpoint, the opinion seriously jeopardizes major innovations in legislative reform over the last two decades. Secondly, the decision severely undercuts the authority of the Congress to declare and protect the rights of United States citizens.¹²²

The Court reveals its overall lack of familiarity with the subject matter of this case in its very first footnote.¹²³ This overly simplistic definition of "community living arrangements" leads an ordinarily deferential and unsuspecting reader to believe that the only advantages community living arrangements (CLA) offer over institutions is that they are less isolated and afford to people with retardation a similar life as nonretarded persons. Such an explanation erroneously casts respondents' position in a frivolous light.¹²⁴ Similarly, the scope of the term "developmental disability" is inaccurately characterized in footnote three.¹²⁵ Had the Court examined the Code of Federal Regulations in an effort to secure a definition, it would have found that the term embraces full coverage of persons with retardation.¹²⁶

mentally Disabled Assistance and Bill of Rights Act as only establishing a national policy. *Id.* at 31.

121. 451 U.S. 1 (1981).

122. The authors make no mere observation here but challenge Congress to act immediately to prevent the Court from defeating the intent of the legislation. We submit proposals for amendments to the Bill of Rights Act as Appendix B to this article.

123. 451 U.S. at 6 n.1. The footnote states that, "[c]ommunity living arrangements' are smaller, less isolated residences where retarded persons are treated as much as possible like nonretarded persons." *Id.* Note the absence of any reference here to the habilitation that community living makes possible. Such habilitation is a *raison d'être* of such government-provided services.

124. Community living embraces the use of a larger spectrum of services, some of which are used as a matter of course by nonretarded persons. A "house-type" residential setting is only one of many different possibilities for community care. There are many other models, including foster placement, family placement, apartment living and independent living. Other existing residential possibilities include subsidized relatives' homes and supervised apartment clusters. The type of arrangement depends on the needs and abilities of the prospective resident. See generally Heal, Sigelman & Suitzky, *Research on Community Residential Alternatives for the Mentally Retarded*, in R. Flynn & K. Nitsch, *supra* note 46, at 215-58; Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. REV. (1983) (in press).

125. 451 U.S. at 8 n.3. The footnote states that "[a]s originally enacted in 1975, the definition of 'developmentally disabled' included mental retardation. § 6001(7)(A)(i). As amended in 1978, however, a mentally retarded individual is considered developmentally disabled only if he satisfies various criteria set forth in the Act." *Id.*

126. See *supra* note 45. The definition of retardation itself requires the onset of retardation early in life, before the age of eighteen, as set forth in the regulation. *Id.*

The Court places great weight on its finding that the Bill of Rights Act was not enacted pursuant to section five of the fourteenth amendment. Its conclusion that "Congress will not *implicitly* attempt to impose massive financial obligations on the States,"¹²⁷ is based on the premise that the Court "should not quickly attribute to Congress an *unstated intent* to act . . ." under its fourteenth amendment authority.¹²⁸ The Court notes that other statutes upheld as enactments under the fourteenth amendment contain explicit references to section five.¹²⁹ In this case, an attentive reading of the Bill of Rights Act in its entirety and its legislative history, as discussed above, clearly indicates affirmative congressional intent to protect the constitutional rights of people with developmental disabilities, especially their liberty interests. Congress did so by requiring all federally funded programs to provide appropriate habilitation in the least restrictive environment.¹³⁰ The test set forth in *Pennhurst* is, in fact, satisfied by the Bill of Rights Act.

The Court correctly recognized that Congress may fix the terms on which it shall disperse federal money to the States¹³¹ but proceeds to misapply a contract analysis to the Act. Insisting that Congress speak with a clear voice when imposing "conditions" on state acceptance of federal funds, the Court mistakenly perceives this requisite clarity as requiring Congress to spell out the word "condition" in the

MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 11 (H. Grossman ed. 1977).

127. 451 U.S. at 17 (emphasis added).

128. *Id.* at 16 (emphasis added).

129. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (1972 amendments to the Civil Rights Act of 1964); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Voting Rights Act Amendments of 1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Voting Rights Act of 1965).

130. The Congressional direction and interest were clear. "Too often developmentally disabled persons are 'put away' in an institution and forgotten. It is now time to provide alternatives to locking persons up in institutions. Treating the developmentally disabled with more human dignity can bring additional benefits to themselves, their families and to society." 121 CONG. REC. 16,522 (1975) (statement of Sen. Schweiker).

[O]ne very clear basic goal has been enunciated in the legislation reported from committee. That is the need to move away from long-term institutionalization of individuals with developmental disabilities to the development of community-based programs utilizing all community resources related to treatment or habilitation of such individuals to provide comprehensive services in the home community.

Id. at 16,520 (statement of Sen. Cranston). The basis for the direction and interest was equally clear: the inmates' personal constitutional rights. See *supra* text accompanying notes 70, 114.

131. 451 U.S. at 35 (White, J., dissenting in part).

statutory provision:¹³² "Indeed, in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly."¹³³ To illustrate its point, the Court relies on *King v. Smith*,¹³⁴ by stating that the "Social Security Act creates a 'federally imposed obligation on the States to furnish aid to families with dependent children. . . .'"¹³⁵ Such reasoning raises an interesting query: How does this language, which supported the Court's finding of congressional intent to impose a condition on state receipt of federal funds, differ from the plain language of the Bill of Rights Act? The answer is that there is no difference whatsoever: "The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that [do not provide certain requirements nor meet certain standards contained herein]."¹³⁶ In this Act, Congress not only conditioned receipt of federal funds upon the state's compliance with certain specified federal standards, but reaffirmed the federal government's own commitment to fulfilling the same ends. Thus, the statutory mandates of section 6010(3) should have been doubly clear to the Court.

The Court also managed to distort the major issue presented in *Pennhurst*. The twisted path down which the Court wandered was this: "[W]hether Congress in [section] 6010 imposed an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys under the Act or whether it spoke merely in precatory terms."¹³⁷ The mischief worked by this contorted framing of the issue misled the Court to believe that upholding the statute would overburden the states by placing obscure and previously unrecognized *affirmative* obligations on unsuspecting participants under the Act.¹³⁸ The Act, however, does not pretend to

132. The plain language of the statute and legislative history both express a clear and unambiguous national commitment to deinstitutionalization. Furthermore, the legislative history demonstrates that Congress was very much aware of the expense involved in this undertaking. It is of no import that section 6010 lacks explicitly "conditional" language while numerous other provisions contain the same. Hornbook law teaches that contractual conditions may be implied. "The fact that Congress spoke in generalized terms rather than the language of regulatory minutia cannot make nugatory actions so carefully undertaken." *Id.*

133. *Id.* at 17-18.

134. 392 U.S. 309 (1968).

135. 451 U.S. at 18 (quoting *King v. Smith*, 392 U.S. at 333).

136. 42 U.S.C. § 6010(3) (1976).

137. 451 U.S. at 18.

138. *Id.* at 17-18.

create such affirmative obligations; rather, the statute is prohibitory in nature, like the other statutes recognized by the Court as enacted pursuant to the fourteenth amendment. The unambiguous obligation imposed by section 6010 on states choosing to accept federal funds under the Act is merely this: Participants must not use public funds to maintain facilities for persons with developmental disabilities that do not meet standards determined by Congress to best insure the legal and human rights of the beneficiaries as set forth in the Act.

The Court finds "nothing in the Act or its legislative history to suggest that Congress intended to require the States to assume the high cost of providing [persons with developmental disabilities] with 'appropriate treatment' in the 'least restrictive environment.'" ¹³⁹ Contrary to the Court's findings, provisions contained in both the general and specific statements of purpose of the Act support a broader construction. Listed under "General Provisions" of the Act is a congressional declaration of findings and purpose: "[I]t is in the national interest to strengthen specific programs . . . that reduce or eliminate the need for institutional care . . . to meet the needs of persons with developmental disabilities."¹⁴⁰ The very next provision further states:

It is the overall purpose of this chapter to assist States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities.¹⁴¹

Moreover, title II specifies some of the "legal and human rights" to be protected under the Act and, as amended in 1978, leaves no doubt that the rights contained in section 6010 are "in addition to any con-

139. *Id.* at 18. The Court is delinquent in its duty to accurately apply the Act to the facts. In making this statement, it omits any reference to the Act as a joint federal and state cooperative program, and discusses only state obligations imposed thereunder. This misconception drastically prejudiced Respondents' case in the eyes of the Court, for without a firm commitment of federal funds to contribute to the process of deinstitutionalization, the States may not be able to afford the transition costs of moving away from traditional institutional care. The Court's failure to mention that the federal government is prepared to contribute from seventy-five to ninety percent of the cost of programs under this Act was a serious oversight.

140. 42 U.S.C. § 6000(a)(5) (Supp. IV 1980).

141. *Id.* § 6000(b)(1) (Supp. IV 1980).

stitutional or other rights otherwise afforded to all persons.”¹⁴² Thus, the Court’s assertion that “[n]othing in either the ‘overall’ or ‘specific’ purposes of the Act reveals an intent to require the States to fund *new, substantive rights*” falls flat.¹⁴³

The Court’s selective treatment of the Act’s legislative history places great emphasis on the fact that the original House version of the Act, “contained no bill of rights provision whatsoever.”¹⁴⁴ From this the Court concludes that the House Committee “merely applauded the efforts of others to secure rights for the developmentally disabled,” instead of joining their ranks.¹⁴⁵ In context, the paragraph from which the Court stripped the word “applauded” explains that the committee

is well aware that our disabled and handicapped citizens are often unreasonably and unnecessarily deprived of their rights and relegated to second class status. As such, it applauds this effort on the part of the developmental disabilities program to establish, assure, and preserve the rights of the disabled including all of those enumerated above.¹⁴⁶

The Court stopped short of carrying out the next logical step in its analysis: By compromising H.R. 14215 to include a modified version of the Senate’s approved “Bill of Rights” provision, S. 462,¹⁴⁷ the House adopted the Senate’s commitment to establish and protect the rights of the developmentally disabled.¹⁴⁸

The Court charges that the argument in favor of recognizing constitutional rights and additional federal guarantees of the developmentally disabled under the Bill of Rights Act is supported only by “scattered bits of legislative history.”¹⁴⁹ This is not the case, as

142. *Id.* § 6010 (Supp. IV 1980).

143. 451 U.S. at 18 (emphasis added). Perhaps the Court’s treatment of section 6010 was influenced by its mistaken notion that Congress was attempting to impose “absolute obligations” on the States. *Id.* at 18. The obligations imposed in section 6010 are conditional and not absolute, and are to be jointly assured by federal and state governments, not by any single state.

144. 451 U.S. at 20.

145. *Id.*

146. H.R. REP. NO. 58, *supra* note 80, at 7, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 925.

147. See *supra* notes 67-83 and accompanying text.

148. The House Committee further articulated its conviction that more money could be effectively spent on the Act’s programs, particularly “in light of the *new requirements* for an emphasis on deinstitutionalization . . . which is it [sic] realized *may prove expensive*.” H.R. REP. NO. 58, *supra* note 80, at 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 926 (emphasis added).

149. 451 U.S. at 20.

we believe the discussion above demonstrated. The Court's statement that "[e]ven Senator Javits, the principle proponent of Title II, did not read the Act as establishing new substantive rights to enforce those guaranteed by the Constitution"¹⁵⁰ does not represent his views.¹⁵¹

In 1978, section 6010 was amended to provide "[t]he rights of persons with developmental disabilities *described* in findings made in this section *are* in addition to any constitutional or other rights otherwise afforded to all persons."¹⁵² The only support the Court offers for its tortured construction of these words, which it finds to have only "described" rights and not to have created them,¹⁵³ is the fact that the provision is without any legislative history.¹⁵⁴ That is the extent of the Court's justification and it is a flimsy basis, one unsupported by precedent, upon which to cripple a major piece of legislation. Indeed, in the absence of any language indicating negative intent, these words amply support the implication of a private right of action under the ordinary rules of statutory construction.

In summarily rejecting the Solicitor General's contention that Congress conditioned the grant of federal money on the States' agreement to underwrite the obligations of section 6010 pursuant to its spending power,¹⁵⁵ the Court overlooked the necessity of viewing the Act in its entirety to determine the intended scope of its operation. The amended Act provides that the State Plan

must contain or be supported by assurances satisfactory to the

150. *Id.* at 21.

151. Senator Javits is on record stating that:

Congress should reaffirm its belief in equal rights for all citizens—including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded. . . . This Bill of Rights represents a reaffirmation of the basic human and civil rights of all citizens. It offers the direction to provide a valid and realistic framework for improving the overall situation of this country's mentally retarded and other developmentally disabled individuals.

121 CONG. REC. 16,519 (1975) (statement of Sen. Javits). Senator Javits believed that the adoption of S.462 would mark a major step forward toward the day when people with retardation, their families, their friends and all Americans could be proud that one of our most ignored minorities is properly protected under the laws of the United States. *Id.*

152. 42 U.S.C. § 6010 (Supp. IV 1980) (emphasis added).

153. 451 U.S. at 22 n.16. A standard grammatical diagram of the statute's provision, see Appendix C, reveals the Court's misplaced emphasis on the word "described" as the active verb in the sentence. The word "are" is the proper verb upon which the Court should have focused. "Described" is a mere verb phrase of the subject "rights."

154. 451 U.S. at 23.

155. *Id.* at 22-23.

Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to rights of the developmentally disabled).¹⁵⁶

A fair reading of this language suggests that the receipt of federal funds is impliedly conditioned upon approval by the Secretary of a state plan complying with this provision. The Court acknowledges that the Secretary has interpreted the 1978 recodification of section 6063(b)(5)(C) to require a participating state to assure the Department that programs funded under the Act are consistent with section 6010.¹⁵⁷ Yet the Court fails to fathom the possibility that funds may legitimately be withheld for noncompliance, based on the lack of express statutory authority and support for explicit legislative history. Again, the Court's decision eschews the logic in the provisions: if there is no state provision in compliance with section 6010 and no approvable state plan, there may be no allotment of federal funds.¹⁵⁸

Unimpressive is the fact that Pennsylvania received only 1.6 million dollars under the Act in 1976, a sum the Court deems "woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting. . . ." ¹⁵⁹ This observation fails to support the Court's deduction that "Congress must have had a limited purpose in enacting section 6010," ¹⁶⁰ and indicates instead the lack of initiative Pennsylvania chose to exercise in seeking federal aid or more wisely utilizing the funds misspent on institutions.¹⁶¹ To merit a larger grant, Pennsylvania must adopt a greater commitment to deinstitutionalization. The Court should have noted that the Bill of Rights Act is a cooperative program, one imposing a shared responsibility on federal and state governments to remedy conditions of abuse and neglect long visited upon the nation's disabled.

156. 42 U.S.C. § 6063(b)(5)(C) (Supp. IV 1980).

157. 45 Fed. Reg. 31,006 (1980).

158. *See supra* notes 131-38 and accompanying text.

159. 451 U.S. at 24.

160. *Id.*

161. In 1978, the annual cost of the Pennhurst institution was found to have been more than enough to pay for more effective community services for all of its residents. 446 F. Supp. at 1311-12. As of June, 1982, this situation remained unchanged. 542 F. Supp. 619, 628 (1982).

VII. CONCLUSION

The Supreme Court of the United States has frustrated congressional authority to protect the equal rights of the persons with disabilities through legislation explicitly enacted for that purpose. By holding that the Developmentally Disabled Assistance and Bill of Rights Act is a mere expression of "congressional preference for certain kinds of treatment of the developmentally disabled,"¹⁶² the Court reduced carefully studied, painstakingly evolved legislation to a jumble of "politically self-serving but essentially meaningless language about what the developmentally disabled deserve at the hands of state and federal authorities."¹⁶³

Congress has also been delinquent in its duty to pass legislation which would effectively overrule *Pennhurst*. The decision struck a damaging blow to two decades of legislative action which has contributed to a broad national effort to end chronic abuse and unnecessary institutionalization. If *Pennhurst* and other anachronistic institutions are allowed to stand, America's promise to its "differently-abled" population will remain woefully unfulfilled.

162. 451 U.S. at 19.

163. *Id.* at 32 (Blackmun, J., concurring).

APPENDIX A

§ 6010. Congressional Findings Respecting Rights of the Developmentally Disabled.

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation of such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards ap-

plicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed. Reg. pt. II), as appropriate when taking into account the size of the institution and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons.

42 U.S.C. § 6010 (1976 & Supp. IV 1980).

APPENDIX B

A. *Proposed Revision of Section 6010*

Receipt of any funds under this Act is conditioned upon the state's observance and active protection of the human and legal rights of the developmentally disabled contained herein. Such rights shall be enforceable by any beneficiary of a program or service through legal or administrative proceedings, or as otherwise appropriate.

B. *Alternate Proposed Revision of Section 6010*

Rights of persons with developmental disabilities *are hereby established* in addition to any constitutional or other rights otherwise afforded to all persons *and shall be enforceable through legal or administrative proceedings or as otherwise appropriate, without exhaustion of administrative remedies* [new].

C. *Proposed Revision of Section 6062*

(a)(1) In each fiscal year, the Secretary shall, in accordance

with regulations and this paragraph, allot the sums appropriated for such year under section 6061 of this title among the States, on the basis of—

(A) the population,

(B) the extent of need for services for persons with developmental disabilities, and

(C) the financial need,

of the respective States. Sums allotted to the States under this section shall be (1) *conditioned upon the State's observance of the human and legal rights of the developmentally disabled, including but not limited to those rights specified in section 6010 herein*, [new] and (2) used in accordance with approved State plans under section 6063 of this title for the provision of services for persons with developmental disabilities. *Failure to comply with requirements (1) and (2) contained herein shall provide cause for withdrawal of committed funds and/or forfeiture of future funds* [new].

D. *Proposed Revision of Section 6012*

(a) In order for a State to receive an allotment . . . (1) the State must have in effect a system to protect and advocate the rights of persons with developmental disabilities, *including but not limited to those rights under section 6010 herein*, [new] (2) such system must (A) have the authority to pursue legal, administrative and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, (B) not be administered by the State Planning Council, and (C) be independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities, and (3) the State must submit to the Secretary in a form prescribed by the Secretary in regulations (A) a report, not less often than once every three years, describing the system and (B) an annual report describing the activities carried out under the system and any changes made in the system during the previous year.

The diagram illustrates the relationship between two groups of rights. On the left, a horizontal line represents the 'DESCRIBED' group, with the text 'The of persons' above it and 'with disabilities' and 'developmental' below it. To the right of this line is the word 'ARE'. Further right, a vertical line connects to another horizontal line representing the 'RIGHTS' group. Above this line is the text 'in addition to', and below it is 'made in section this'. To the right of this line, the word 'RIGHTS' is written above a horizontal line. Below this line, the text 'constitutional', 'other', and 'otherwise' are written in a box. To the right of this box, the text 'afforded to persons' and 'all' are written above a horizontal line.